CHEE NG v. PUBLIC PROSECUTOR.

[Criminal Revision (Evans, J.) May 31, 1947]

Criminal Procedure Code (F.M.S.) Section 407 —Forfeiture—Forfeiture of property is a punishment under the Penal Code but only in cases where special provision is made for such punishment—Forfeiture of property is not a punishment for an offence under Section 411 of the Penal Code—Penal Code, Sections 53, 126, 127 and 169.

In this case the learned District Judge had made an order for the confiscation of a lorry, which was found removing tin ore, the order being made on the conviction under Section 411 of the Penal Code of the accused driver and another for unlawful removal of tin ore. The owner of the lorry applied for revision of this order of confiscation.

Held, (1) that the Penal Code makes special provisions as to the cases in which forfeiture of property is a proper punishment and it is only in those cases that the Court can make an order for forfeiture or confiscation of property under Section 407 of the Criminal Procedure Code.

(2) that forfeiture is not a punishment for an offence under Section 411 of the Penal Code and that therefore the District Judge had no jurisdiction to make the order of confiscation in this case.

Cases referred to :—

(1) *Hollington v. Hewthorn & Co.* (1943) 2 A.E.R 35.

(2) *In the Estate of Crippen* (1911) P. 108.

(3) *Tan Khoo Chor v. Public Prosecutor* (1940) F.M.S.L.R. 254.

(4) *Tan Hoon Swee v. Public Prosecutor* 6 F.M.S.L.R. 191.

(5) *Babu Singh v. Public Prosecutor* (1939) F.M.S.L.R. 228.

(6) *Barbour v. Public Prosecutor* 6 F.M.S.L.R. 113.

(7) *Swee Un v. Rex* 10 S.S.L.R. 69.

(8) *Bhattancharjee v. Emperor* 34 Cal. 986.

APPLICATION FOR REVISION.

S. K. Das for the applicant.

M. G. Neal (D.P.P) for the respondent.

Evans, J. :—This is an application for revision. It is submitted by the owner of a lorry in respect of his lorry which was found removing tin ore, and on the conviction of the accused driver and another for the unlawful removal of the tin ore, the District Judge made an order of "confiscation of the lorry which is to be sold by public auction and the proceeds credited to revenue". The District Judge does not purport to be acting under any particular provision of the law. He is said generally to be acting under Section 407 of the Criminal Procedure Code which refers to forfeiture or confiscation.

I have been referred to a number of cases in which the Courts are said to have acted under that Section of the Code. It is rather curious that there is not a single case in which they purported to act under that section on a conviction under the Penal Code as in this case. They all refer to the Rubber Supervision Enactment, the Customs Enactment, the Liquor Revenue Enactment etc. which are all special provisions dealing with limited subjects and not dealing with crime generally, and I do not propose to go into them at length. Some of them seem to me to be confused with issues which do not seem necessarily to arise. The first is that of notice which probably depends on the terms of the law under which the Court was acting. If the statute does not require notice, I do not think judicial decision can make it necessary. In this particular case the man has had several weeks' notice that his lorry was taken. He was present in Court, and it is a very common practice for persons who are not actually charged, but are interested, to instruct lawyers to appear or to appear in person and ask to be heard, and if they have any grounds they are heard. It is a common practice. I do not propose to go into this point.

These cases refer nowhere and seem rather to ignore two fundamental principles of law or of its administration. In the first place civil rights of property in general are not now affected by criminal proceedings at all. The only result of criminal proceedings for theft would be the establishment of the fact that a man is a thief, he could have acquired no right of property and could give no title. That is a question of fact which might be proved otherwise as in a case where the title to the property is in dispute. What is more a recent case *Hollington v. Hewthorn & Co.*[1] shows that what was thought was law after *In the Estate of Crippen*[2] is no longer good law, and that facts, the subject of a criminal verdict, are not only better proved but must be proved in such civil proceedings. So, as I said, in general, questions of property are not now affected by a criminal conviction and one would not look for provisions dealing with the transfer of property in criminal statutes, or in statutes of criminal procedure.

The word "confiscation" used in the Order is used in its ordinary sense. Confiscation seems to mean "to be sold by auction and the proceeds credited to

revenue". It is much the same thing. As I understand it the "-fisc-" refers to revenue. In *Wharton's* Law Lexicon confiscation is defined as "the condemnation and adjudication to the public treasury, as of goods seized under the Customs Act". The other word to consider is "forfeiture". Now, "forfeiture" is a word which has a definite meaning at English Law and which had a very wide application. For it is not so many years ago that forfeiture was a general punishment for felony. This was a forfeiture of goods to the King; the old law had other provision for deodand the forfeiture of the weapon used for committing murder to pious uses. Forfeiture, according to *Stroud,* quoting Cowel's Interpreter and Ducange, is "a Mulct or Fine,—a punishment for an Offence"; and it is defined in *Wharton's* Law Lexicon as a "penalty for an offence or unlawful act, or for some wilful omission of a tenant of property whereby he loses it . . . . Forfeiture resulted from—Treason, misprision of treason, felony, murder . . . . striking or threatening a judge". Forfeiture was for many years a recognised form of punishment, but any section prescribing forfeiture is now an exception. It is, however, primarily a punishment, and therefore, like any other penalty, it could only be imposed where its imposition is clearly authorised by law.

Now, turning from the English Law to the local law, the Penal Code contains in Section 53 a list of punishments to which offenders are liable under the provisions of this Code, and there these punishments are set out: penal servitude, imprisonment, forfeiture of property, fine and whipping. Turning to Ratanlal, 16th Edition, on page 88 these comments are to be found :—

> Absolute forfeiture of property was a punishment inflicted on persons guilty of high political offences. It could also be inflicted on persons guilty of offences punishable with death. It has been abolished by Act XVI of 1921. In England this punishment is abolished by 33 & 34 Vic., c. 23, s. 1. In America too it is done away with.

He then sets out a list of sections which are exceptions to this general statement and authorise forfeiture of specific property. He sets out three sections, Sections 126, 127 and 169. Mr. Das' industry seems to have discovered one or two more referred to in the Schedule of the Criminal Procedure Code, but the sections of the Penal Code do not correspond. Punishment is not necessary to the definition of crime, it is secondary, but the draftsmen of these Codes have thought fit to make provisions in the Penal Code for all kinds of punishment as well as attaching to each crime defined the punishment which is thought appropriate. The Procedure Code does contain provisions as to sentences and the carrying out thereof in Chapter 27, and they go in the order given in Section 53 of the Penal Code. There is actually no provision in that Chapter as to carrying out the sentence of forfeiture.

In *Tan Khoo Chor v. Public Prosecutor*[3] the most recent case on this matter cited which arose out of a prosecution under the Customs Enactment, Howes J. merely professad to follow *Tan Hoon Swee's case*[4], and decided nothing more. In the rather earlier case, *Babu Singh v. Public Prosecutor*[5] decided by Murray Aynsley J., the same case was not followed. It seems to have been referred to but the Judge only observed that it was not binding on him, and that he saw nothing in the words of Section 407, limiting it to cases where the law provides for forfeiture elsewhere. The prosecution was brought under the Sanitary Boards Enactment. The Deputy Public Prosecutor referred rather strangely to the "minor point of forfeiture"; the point may not have been pressed and the articles forfeited may have been of small value. *Barbour v. Public Prosecutor*[6] is earlier than *Tan Hoon Swee,* and the prosecution was under the Rubber Supervision Enactment. *Swee Un v. Rex*[7] is a Colony case of some age and simply holds that the corresponding Section of the Colony law at that time gave no power of forfeiture on a conviction under the Petroleum Ordinance 1896. *Tan Hoon Swee v. Public Prosecutor*[4] is the leading case on the point and is also on a conviction under a Rubber Enactment, but under the Rubber Dealers Enactment of Johore. The Crown Counsel contends that the decision of the majority in that case is based on an erroneous reading of the Indian provisions, and a misapplication of *Bhattancharjee v. Emperor*[8]. He refers to page 199 of the F.M.S. report and points out that the press in the Indian case was held not to be the instrument with which the offence was committed. McCabe Reay J., to whose judgment he refers, began his judgment with a long historical review of the law. He did not base his decision on the Indian law or case, for at page 202 he says :—

> But the new Code contains an amendment of Section 322 (i), now 405 (ii), on which the prosecution rely and which require careful consideration. The section now reads
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> > '405. (ii) When an enquiry or a trial in any Criminal Court is concluded the Court may make such order as it thinks fit for the forfeiture or other disposal of any property or document whatsoever produced before it or in its custody or the custody of the police or of any public servant regarding which any offence appears to have been committed or which has been used for the commission of any offence,'
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> and the question is, did the Legislature by substituting the words "forfeiture or other disposal of any

property or document whatsoever" for the words "disposal of any document or other property" intend thereby to extend the previous law by conferring a general power of forfeiture? If not, what was the object and what is the effect of the change?

It is not very clear to me what light a history of the cases and law will throw on such a question when the decisions are on laws of other countries and in other terms, and the terms have been deliberately varied from time to time. The Judge's words at page 202, however, make it clear that his decision was directly on the current terms of the local law. Where the law is embodied in Statute, that Statute is the authority for what the law is. No judicial decision can vary it. They may throw some light on its application, but to ascertain the law recourse must be had to the Statute itself.

Section 405 (ii) set out above and considered in the case of *Tan Hoon Swee* does not agree exactly with the form of Section 407 (ii) of our Code as it stands at the moment, and in considering the Enactment one must look at that. The primary source of what the law is, is the statutory declaration of it. It says: "During or at the conclusion of any inquiry or trial in any Criminal Court the Court may make such order as it thinks fit for the custody or disposal of any property or document whatsoever produced before it or in its custody or the custody of the police or of any public servant regarding which any offence appears to have been committed or which has been used for the commission of any offence". There, on the first of the points referred to above as to transfer of property, the words used is "custody" or "disposal", that is to say, the law employs the vaguest and most general terms. It does not profess even to give possession, much less property. The terms used denote the merest physical possession or control. Applications are made in the Courts of this country on conviction as if there were then doubt as to ownership. There is nothing here to suggest that the property in the article is in a sort of suspended state awaiting the order of the Court as to where it belongs. That is certainly not the law.

Then it goes on: "The power herein conferred upon the Court shall include the power to make an order for the forfeiture or confiscation . . . ." So the Court has the power to make an order to forfeit or confiscate. These words mean the same thing as used in the three sections cited by Mr. Das. In Section 126, it says: "Whoever commits depredation, or makes preparations to commit depredation, on the territories of any power in alliance or at peace with the King, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used, or intended to be used, in committing such depredation, or acquired by such depredation". In Section 127, it says: "Whoever receives any property knowing the same to have been taken in the commission of any of the offences mentioned in Sections 125 and 126, shall be punished . . . . and liable to forfeiture of the property so received". Section 169 lays down that if a public servant unlawfully buys or bids for property, such property, if purchased, shall be confiscated. Section 126 and 127 speak of forfeiture, Section 169 of confiscation. The words seem to be used indifferently. Confiscation and forfeiture are both punishments, and, as I understand it, the Penal Code and the Code of Criminal Procedure are part of the same legislation, they speak the same language, and should be read together. Then this Section goes on to provide that the power conferred upon the Court shall be exercised subject to any special provisions relating to forfeiture, confiscation, destruction or delivery contained in the Enactment under which the conviction was had.

The cases cited are, as I have pointed out, cases under the Rubber Supervision, Customs, Petroleum, and the Sanitary Boards Enactments. I am not concerned with what provision for forfeiture those Enactments may make. None is on a conviction under the Penal Code. Under that Code forfeiture is a punishment, and forfeiture of articles used in the commission of the crime is specifically provided for in Section 126. The Code makes special provisions as to the cases in which it is a proper punishment and those cases are strictly limited. This matter arises out of a prosecution under Section 411 and forfeiture is not a punishment for an offence under that Section. In the other cases conviction was had under some special Enactment or Ordinance. In this case, the conviction is had under Section 411 of the Penal Code, and the only references to confiscation and forfeiture in the Penal Code that I can find, or Mr. Das has discovered, are these three—Sections 126, 127 and 169. The man has not been convicted under Section 126, 127 or 169. There is no power of forfeiture whatever. In my view the District Judge had no jurisdiction whatever to make this order and the order is quashed.

Order Quashed.